LIBRARY
SUPREME COURT, U.S.

No. 634

Office - Supreme Court, U.S.
FILED
DEC 3 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

A. MASCHMEIJER, JR. INC.,

Petitioner,

—against—

EASTERN MOTOR EXPRESS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JEROME G. GREENSPAN,
169 William Street,
New York, N. Y.
Attorney for Petitioner,

TABLE OF CONTENTS

	PAGE
JURISDICTION	2
QUESTIONS PRESENTED	3
1. The Court of Appeals erred in reversing the finding of the Trial Judge who found that there was no question of fact as to breach of warranty (a) as there was no proof of reliance (b) that an implied warranty was excluded under the law (c) that the drums afforded reasonable protection	3
2. In a common carrier's action against a shipper for negligence and breach of express and implied warranty, is not the carrier an insurer who has the burden of proof on the entire case?	11
3. Does a shipper assume the liability of an insurer when it tenders for transportation to a common carrier which accepts for transportation a drum containing a liquid general commodity, which drum complies with carriers packing requirement, and for which a clean bill of lading is issued?	16
4 May a common carrier accept for transportation a shipment of a liquid general commodity in drum containers which indicate age, misuse, are out of shape and banged up upon visual examination and inspection, and in common sense issue a clean bill of lading, and upon loss contend a latent defect was the cause?	20
5. As a matter of law the Court of Appeals erred by reversing a judgment which is fortified by the discretion of the trial judge who reserved	

PAGE

decision on petitioner's motion for dismissal at end of respondent's case and again at end of trial which was supported by proof of the record for a dismissal of the complaint 24

Statement of the case 24

Reasons for granting the writ 31

APPENDIX TO PETITION 34

Opinion 34

Judgment 41

AUTHORITIES CITED

Cases

A. T. S. & F. RR. v. U. S., 232 U. S. 199 12

Bamfield v. Goole and Sheffield Transport Co., 103 Law Times 201 31

Barnet v. N. Y. C. & H. R. R., 222 N. Y. 195 ..... 14, 19

Beard v. I. C. R. R., 44 N. W. 800, 801 15

Beck v. Sheldon, 48 N. Y. 365, 369 23

The G. R. Booth, 171 U. S. 450 6

Boston etc. v. Shanley, 107 Mass. 568 31

Commercial Corp. v. N. Y. Barge Corp., 314 U. S. 104 ..... 9, 10, 16, 19

Commodity Credit Corp. v. Norton, 161 Fed. 2d 161 ..... 2, 16, 27, 28, 31, 32

Davis v. Henderson, 226 U. S. 92 32

DeWitt v. Berry, 134 U. S. 306 4

Economy Bldg. & Loan v. West Jersey Title Co., 64 N. J. L. 27, 44 A. 854 3

Farr Co. v. Union Pacific R. R., C. C. A. Col. 106 Fed. 2d 437 ..... 14, 19

PAGE

Gaffey v. Forgione and Romano, 137 A. 218 8
Great Northern Railway Co. v. L. E. P., 38 Law Times Reports 711 31

Hanes v. Shapiro and Smith, 84 N. E. 33, 35 8
Hannibal RR. v. Swift, 12 Wall. 262 ..... 8, 22, 23
Hoisting Sales Engine Co. v. Hall, 237 N. Y. 30, 142 N. E. 342 5
Hover v. D. & R. G. W. R. R., 17 Fed. 2d 881 12

The Kensington, 183 U. S. 263 6
Knott v. Botany Mills, 179 U. S. 71 6

Lester v. U. S. A., 234 Fed. 2d 625 6

McFall v. Compagnie Maritime Belge, 304 N. Y. 314 6
Mulvaney v. King Paint Mfg. Co., 256 Fed. 612 .... 8, 32

Overbury v. Platten, 188 Fed. 2d 155 ..... 8, 32

Pierce v. Winsor, 19 Fed. Case 11151 31

Rainbow Petroleum v. Union Drilling, 1 Pac. 2d 489 8
Rich v. Minolfi, 157 App. Div. 783, aff. 215 N. Y. 666 3

Sams v. Cochrane and Ross, 125 S. E. 626 8
The Southwark, 191 U. S. 1, 13 8

Thompson v. C. M. St. P. & P. R. R. Co., 217 N. W. 927 ..... 8, 19, 21, 23
Tuschman v. Penn. R. R., 230 Fed. 2d 87 ..... 14, 19, 27

Zerega v. Poppe, Federal case No. 18213 18

Statutes

Interstate Commerce Act, 49 U.S.C.A. Sec. 20(11) .. 2, 6, 27, 32

Rule 5 sub. 8 of Tariff MF-ICC. No. 17 17

Title 28 U.S.C. 1254(1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM 1957

A. MASCHMEIJER, JR. INC.,

Petitioner.

—against—

EASTERN MOTOR EXPRESS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States

Petitioner, A. Maschmeijer, Jr. Inc. (defendant below), a corporation organized under the Laws of the State of New York, prays that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit, which was filed September 12, 1957, reversing a judgment of Conger, *J.* which was entered in the United States District Court for the Southern District of New York, on September 27, 1955, dismissing the complaint of respondent (plaintiff below) on the merits and remanding the same for proof of damages and affirming the lower court's failure to make certain findings.

The opinion of the Court of Appeals, made a part of the Appendix to the petition is reported in 247 Fed. 2d 826, and the opinion of the District Court, Conger, *J.* is reported in 141 Fed. Supp. 477, and is set forth in full on pages 43a to 64a of the Appendix of plaintiff-appellant-respondent in the court below. The decision in this case is of great importance to shippers and common carriers because of the effect of the rule enunciated in loss and damage cases under the Interstate Commerce Act, 49 U. S. C. A. Section 20 (11), and 319.

It is respectfully submitted that this decision is in conflict with a decision of the 3rd Circuit Court of Appeals, in the case of *Commodity Credit Corp.* v. *Norton,* 161 Fed. 2d 161; also decisions of this Court, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision and to settle the issue.

Jurisdiction

The jurisdiction of this Court is based upon the provisions of 28 U. S. C. 1254 (1). The judgment of the Court of Appeals reversing the judgment of the United States District Court for the Southern District of New York was entered on September 12, 1957, having been argued on June 12-13, 1957, and decided September 12, 1957; Clark, *Chief J.* and Chase, *C.J.*, and Hincks, *C.J.*, which was unanimously reversed and remanded.

Questions Presented

1.

The Court of Appeals erred in reversing the finding of the Trial Judge who found that there was no question of fact as to breach of warranty (a) as there was no proof of reliance (b) that an implied warranty was excluded under the law (c) that the drums afforded reasonable protection.

The second cause of action was based on the theory of breach of warranty express and implied. Such a cause of action is predicated on proof of a reliance.

> *Rich* v. *Minolfi*, 157 App. Div. 783, aff. 215 N. Y. 666;
>
> *Economy Bldg. & Loan* v. *West Jersey Title Co.*, 64 N. J. L. 27, 44 A. 854.

In the instant case there was a complete failure of proof of reliance for an express warranty and the trial judge so found as a fact when he said:

> "There is nothing in plaintiff's case indicating in the slightest that the words of the bill of lading formed any significant part in plaintiff's determination to carry the load."

The express warranty claimed by the respondent related to fitness and condition of the drums as tendered for transportation. The language is as follows:

> "This is to certify that the above articles are properly described by name and are packed and marked and are in proper condition for transportation ac-

cording to regulations prescribed by the Interstate Commerce Commission."

The implied warranty is as stated from the complaint:

"13. That the delivery of the said methyl phenyl acetate to the plaintiff by the defendant on or about the 2nd day of May, 1949, constituted a warranty, implied in law and in fact, that the said chemical was packed in a safe and proper fashion and that the containers in which the chemical was packed were in good and serviceable condition, and were sufficient to withstand, without harm, damage or leakage, the normal hazards and incidents of transportation.

14. That in truth and in fact, the said containers, or some of them, were not in the said condition and were unable to withstand the normal hazards and incidents of transportation and did in fact, without fault upon the part of the plaintiff, leak and open and permit the chemical contained therein to leave the container, all to the damage of the plaintiff as aforesaid."

It is apparent that the implied warranty is the identical fitness and condition of the express warranty, which under the law is excluded. The Court of Appeals, it is respectfully submitted, erred in reversing the judgment on the implied warranty, when the trial judge found as a fact that there was a failure of proof of reliance.

DeWitt v. *Berry*, 134 U. S. 306, was an action for damages on sale of turpentine on an express warranty of quality. It was also claimed that there was an implied warranty. Mr. Justice Lamar, in passing on the point stated:

"It is the existence of the express warranty or its absence which determines the question. In the case

> at bar there was an express warranty of quality in terms. * * * The law is well settled that under such circumstances, implied warranties do not exist."

and further:

> "There are numerous well considered cases that an express warranty of quality excludes any implied warranty that the articles sold were unmerchantable or fit for their intended use."

Even the case of *Hoisting Sales Engine Co.* v. *Hall*, 237 N. Y. 30, 142 N. E. 342, which is cited by the Court of Appeals as authority for its statement that under the common law, a bailor impliedly warrants that the goods are fit for the use for which the bailment is made as against latent unfitness, supports petitioner's argument, at page 35:

> "This case was not tried on the theory of express warranty, so let us proceed to consider the implied warranty if any. If there be an implied warranty in the hiring of machinery for a special purpose that it is or will be fit for such use or at least will work, then the warranty may be proved or implied even though the hiring was by written agreement containing *no warranty*." (italics supplied)

Can it be said, that when a shipper tenders a shipment to a common carrier complying with its tariff rules and regulations, and properly describing the commodity and using the type of container for the same, for which a clean bill of lading is issued, that there is an implied warranty of fitness of the container against damage from *any* cause imposing the liability on a shipper of an insurer? If so, a a drum container with heavier bottom and sides when subjected to negligent abuse and rough handling in transit

would also leak, and the carrier need only claim a breach of implied warranty without excuse or reason therefor. So too, a new drum would leak as was proven in *McFall* v. *Compagnie Maritime Belge,* 304 N. Y. 314. It would be much simpler for a carrier to require a drum container with more particularity as to specifications to take advantage of a breach of warranty. As the proof showed, the drums fully complied with the tariff regulations and so found as a fact by the trial judge. It was further found that the regulations "do not require a drum that shall never leak merely one affording reasonable protection, etc.". That is all that can be said for the packing rule, prepared by the carriers for their own protection. To require more than reasonable protection, fitness and strength of the drum would impose more of an obligation than is required by other standards and analogy, as for instance, seaworthiness of a vessel on a claim for a cargo loss by breach of warranty which is similar to the claim herein. It is said that seaworthiness test is whether the vessel is *reasonably fit* to carry the cargo which she has undertaken to transport. *Reasonably fit* is the commonly accepted test, (italics supplied), *The G. R. Booth,* 171 U. S. 450; *The Kensington,* 183 U. S. 263; *Knott* v. *Botany Mills,* 179 U. S. 71; *Lester* v. *U. S. A.,* 234 Fed. 2d 625; Reasonable is the word that is used throughout rule 5 of the tariff. Reasonableness is the normal test applied in all types of dealings, especially in negligence matters. The trial judge found as a fact that the drums afforded reasonable protection and such a finding is usually followed by this court, *The Southwark,* 191 U. S. 1, 13.

In cases involving loss and damage under 49 U. S. C. A. 20 (11), it is contrary to law that a shipper of general com-

modities and a common carrier should both be held liable as insurers. This application of the law conflicts with the basic theory of a common carrier's legal obligation as an insurer, especially since the carrier is best able to explain the cause for the loss. In the instant case the photos vividly show that the drums were out of shape and banged up after the transportation was completed, caused entirely by carrier and against which the petitioner could not impliedly warrant the drums as fit. The complaint as shown by the 13th and 14th allegations is implicit in this regard, for it is alleged that the drums,

> "were sufficient to withstand, without harm"

and that in truth and fact were unable to withstand

> "without fault upon the part of the plaintiff".

But there was no explanation from respondent for the bad physical condition of these drums after transportation was completed. This bad physical condition was caused by the fault and harm of the respondent. The Court of Appeals erred in stating that the facts imperatively required that petitioner breached an implied warranty under the common law as recognized by the packing rule:

(1) The trial judge found a compliance with tariff and packing rule.

(2) Respondent as an insurer was obliged to explain the cause for the bad physical condition of the drums as shown by the pictures, as such condition was caused by its fault and harm.

(3) This was not the ordinary contract of bailment, but of a special liability, approximating that of an insurer.

Hanes v. *Shapiro and Smith*, 84 N. E. 33, 35.
Sams v. *Cochran and Ross*, 125 S. E. 626.

(4) Uncontradicted proof that the drums sustained damage by the fault of respondent, as shown by photos, and by proof of the physical condition of the drums before and after completion of transportation.

(5) Examination and inspection of the drums prior to acceptance for transportation, does not under the law imply the obligation or warranty of reasonable fitness or capability of the article.

Gaffey v. *Forgione and Romano*, 137 A. 218.
Rainbow Petroleum v. *Union Drilling*, 1 Pac. 2d 489.

Any explanation for the bad physical condition of the drums, would indicate the futility of respondent's position, because, if the answer is that the drums as tendered were in the condition as shown by the photos, the rule of *Thompson* v. *C. M. St. & P. RR.*, 217 N. W. 927, *Hannibal RR.* v. *Swift*, 12 Wall. 262, *Gaffey* v. *Forgione*, *supra*, and *Rainbow* v. *Union Drilling*, *supra*, would apply. If as shown by the bill of lading and the proof that the drums were in good condition when tendered, then what is depicted by the photos was caused by its negligent rough handling and abuse in transportation as the proximate or contributing cause for the loss to impose liability as a common carrier.

The Court of Appeals therefore erred in reversing the judgment by applying the wrong rule of law for absolute liability for breach of warranty. The cases of *Overbury* v. *Platten*, 188 Fed. 2d 155, and *Mulvaney* v. *King Paint Mfg. Co.*, 256 Fed. 612, were cases of ordinary bailment.

In neither was there a special agreement of a common carrier, namely as an insurer. As was indicated in *Commercial Corp.* v. *N. Y. Barge Corp.*, 314 U. S. 104:

> "Hence, we are not concerned with the rules that one who has assumed the obligation of a common carrier can relieve himself of liability to carry safely only by showing that the cause of loss was within one of the narrowly restricted exceptions which the law itself annexed to his undertaking, or for which it permits him to stipulate, the burden rests upon him to show the loss is due to an excepted cause and that he has exercised due care to avoid it, not in consequence of his being an ordinary bailee but because he is a special type of bailee who has assumed the obligation of an insurer."

Petitioner in the exercise of care proved what tests and inspections were made prior to filling each drum and before shipment, which the court stated were irrelevant. Nevertheless, there was additional proof of the bad physical condition of the drums after the transportation which was very persuasive evidence of the cause of the leaks, imposing upon the respondent the obligation to sustain its burden on the whole case. In *Commercial Corp.* v. *N. Y. Barge Corp., supra,* it was said:

> "The burden of proof in a litigation, wherever the law has placed it, does not shift with the evidence, and in determining whether petitioner has sustained the burden the question often is, as in this case, what inferences of fact he may summon to his aid. In answering it in this, as in others where breach of duty is the issue, the law takes into account the relative opportunity of the parties to know the facts in issue and to account for the loss which it is

> alleged is due to the breach. Since the bailee in general is in a better position than the bailor to know the cause of the loss and to show that it was one not involving the bailee's liability, the law lays on him the duty to come forward with the information available to him * * *. If the bailee fails, it leaves the trier of the facts free to draw an inference unfavorable to him upon the bailor's establishing the unexplained failure to deliver the goods safely."

Commercial Corp., v. *N. Y. Barge Corp., supra,* is authority for the statement that breach of warranty is also a matter of burden of proof. Respondent as shown by its complaint, alleged that the drums were warranted to be in good and serviceable condition, and were sufficient to withstand, *without harm, without fault on its part the normal hazards and incidents of transportation.* The bad physical condition of the drums as shown by the photos after transportation was completed, was not part of the normal hazards and incidents of transportation. There was no further proof on respondent's part to explain such bad condition. In this regard therefore, it failed to sustain the burden of proof to establish the cause of action for breach of warranty on the whole case. (Italics supplied)

2.

In a common carrier's action against a shipper for negligence and breach of express and implied warranty, is not the carrier an insurer who has the burden of proof on the entire case?

The complaint in the action contained two (2) causes of action, negligence and breach of an express and implied warranty. Stated simply, the carrier respondent accepted for transportation a shipment from petitioner containing a liquid general commodity known as methyl phenyl acetate in 30-55 gallon metal drums on May 2, 1949, at Newark, N. J. consigned to Eli Lilly & Co. at Indianapolis, Indiana, for which a clean bill of lading was issued, after inspection and loading onto the trailer. There is no question of fact that the liquid was properly described and that the drums complied with carrier packing rule in the tariff governing the movement. This is admitted. En route, two (2) of the drums leaked, causing damage for which this action was instituted. Respondent's proof, by a metallurgist indicated a break in the bottom of each drum as having been caused by fatigue, and it further contended this was a latent defect for which it was not liable as a common carrier. Petitioner then offered proof without any contradiction that the shipment was tendered to respondent a common carrier, as a truckload. That petitioner loaded the 30 drums into an empty trailer by rolling same on the floor on the side of each drum and leaving them in such position. That respondent's employees up-ended the drums in order to load other merchandise on the floor, as the drums were placed along the sides and front of the trailer. That respondent did not

secure, brace, or block the drums from falling, chafing, jarring, jolting, shifting and bumping in transit, nor utilize skids or pallets which were available to raise other merchandise from the same floor level. With respect to such an obligation or requirement, this Court stated in *A. T. S. & F. RR.* v. *U. S.*, 232 U. S. 199.

> "as a general rule the carrier loads all freight tendered in less than carload lots."

and again in the same case:

> "Loading may involve more than placing of the freight on the car, since the character of the shipment may be such as to require the furnishing and placing of stakes, racks, blocks and binders needed to make transportation safe. • • • ."

and in *Hover* v. *D. & R. G. W. R. R.*, 17 Fed. 2d 881, the court said:

> "The loss or leaking of drums may have been caused by many other things • • • as for instance • • • failure to properly secure drums, or proper bracing the other merchandise, loosening and shifting of load."

The load was tendered as a truckload and paid for as such. When the other merchandise was loaded into the trailer, the entire load became less than truckload shipments imposing the obligation upon respondent to secure the same. Nothwithstanding, petitioner offered photographic proof of the bad physical condition of the drums due to such failure to brace, block and secure, and negligent abuse and rough handling in transportation to which each was subjected as the direct or contributing cause for

the leak and damage. These photos were taken at respondent's terminal after transportation was completed, and are being submitted to this Honorable Court as part of the exhibits with the petition herein being filed so that an independent determination of abuse and rough handling as negligence, may be made of what is depicted.

After an examination is made of the photos, the next question that is presented, namely, was not the bad physical condition proof of negligent abuse and rough handling in transportation as the proximate or contributing cause of the leaks, requiring affirmative proof or explanation from the respondent. Respondent offered neither. Its expert metallurgist stated his answer to the following question:

> "These pictures which I have just shown you of drum number one and two have dents in the sides of each drum, did you notice that"

to which he replied with emphasis:

> "Those pictures certainly showed that!"

Petitioner's witnesses stated without contradiction that the drums in the banged up and out of shape condition as depicted would not have been used in preparation for a shipment of a liquid commodity. In other words, after respondent proved the alleged cause for the leaks and damage, as a latent defect, the burden of going forward with evidence was cast upon petitioner and facts were offered to show that such drums when tendered and accepted for transportation were in good physical condition, during which time the same were subjected to negligent abuse and rough handling causing them to become banged up and out

of shape, as a result of which each was physically changed for the worse, all without any contradiction by respondent.

With such evidence, the burden of going forward with proof was cast upon respondent to make some answer or explanation that the loss was caused solely and only by the alleged latent defect, which it failed to do. This was compelled because respondent was seeking to be relieved of its liability of an insurer by attempting to prove a shipper fault as an exception under the bill of lading, and petitioner proved by the photos that the drums in transportation were banged up and out of shape and not in the same condition when tendered, through negligent abuse and rough handling as the proximate or contributing cause of the leaking drums.

> *Barnet* v. *N. Y. C. & H. R. R.*, 222 N. Y. 195;
> *Taschman* v *Penn. R. R.*, 230 Fed. 2d 87;
> *Farr Co.* v. *Union Pacific R. R., C. C. A. Col.* 106 Fed. 2d 437.

The Court of Appeals in its opinion, impliedly concedes that had skids or pallets been used, the other merchandise would not have been damaged. But because of the pervasive odor of the liquid, the other merchandise was damaged. This is in the following language.

> "Skids and pallets apparently would not have avoided damage to other merchandise caused by the pervasive odor of m.p.a."

Petitioner urges that this damage by odor was caused by carelessness of respondent because it failed to exercise care and precaution in choosing what kind of merchandise to load into the same trailer, since a common carrier is required to know the characteristics of the property it

transports. As was stated in *Beard* v. *I. C. R. R.*, 44 N. W. 800, 801.

> "We will proceed to inquire as to the duty of defendant upon receiving the butter in a car from Cairo Short Line for transportation to New Orleans, without directions or instructions as to character in which it should be carried. A carrier's duty is not limited to the transportation of goods delivered for carriage. *He must exercise such diligence as is required by law to protect the goods from destruction and injury resulting from conditions which in the exercise of due care may be averted or counteracted.* * * * *The nature of the goods must be considered in determining the carrier's duty.* Some metals may be transported in open cars. Many articles of commerce, when transported must be protected from rain, sunshine, and heat, and must have cars fitted for their safe transportation. Live animals must have food and water, when distance of transportation demands it. Fruit and some other perishables must be carried with expedition and protection from frost. *So the carrier must attend to the character of the goods he transports. He is informed thereof by inspection of the freight bills, or by other papers accompanying the shipment.* (Italics supplied)

There is sufficient proof for a finding that respondents' acts and conduct, namely (1) failing to brace, block and secure the drums, (2) failure to utilize skids or pallets which were available, (3) failure to recognize the characteristics and nature of a shipment of liquid methyl phenyl acetate in drums by loading with it other merchandise subject to being damaged by the pervasive odor, (4) negligent abuse and rough handling of drums in transportation, any one or all of which together would be cause proximate or contributory for the loss, compelling answer or expla-

nation from respondent, as a common carrier, who had the burden of proof, on the whole case as the plaintiff.

Commercial Corp. v. *N. Y. Barge Corp.*, 314 U. S. 104.

Under the rule now enunciated by the Court of Appeals, a common carrier is liable only for negligence and the burden of proof to explain the cause of loss is changed from that of the common carrier to the shipper. *Commodity Credit Corp.* v. *Norton*, 167 F. 2d 161, held to the contrary, and it is necessary therefore that this Honorable Court should clarify the rule of liability of a common carrier as an insurer, and the burden of proof in actions for loss and damage arising under the Interstate Commerce Act, because of its importance in commerce and for the benefit of shippers and carriers alike, and to resolve the alleged conflict between the Circuit Courts.

3.

Does a shipper assume the liability of an insurer when it tenders for transportation to a common carrier which accepts for transportation a drum containing a liquid general commodity, which drum complies with carriers packing requirement, and for which a clean bill of lading is issued?

Respondent's witness, Mr. Brown admitted that the drums used to contain the liquid general commodity which was properly described on the bill of lading, complied with its tariff requirements. The requirement merely specified *a* drum be utilized to contain the liquid, and for this pur-

pose, a used drum satisfied the rule, provided it also complied with Rule 5 sub. 8 of Tariff MF-ICC. No. 17, which provides:

> "barrels, * * * drums * * * must be made of wood * * * metal of such strength as to afford safe handling, reasonable and proper precaution of contents, and to protect against damage to other freight."

When the shipment of the 30 drums was tendered to respondent, its driver examined and inspected each drum for leaks and to make certain they were in good condition, after which he issued a clean bill of lading for the property. This bill of lading, petitioner contends indicated a compliance with the packing rule, carrier's satisfaction of the condition of the drums and that each complied with the tariff regulations. Nothing more was required to be done by petitioner. The proof shows further and without any contradiction that petitioner made several tests and inspections in exercise of its due care of each drum to determine fitness and suitability, even though respondent's metallurgist stated that there was no known test to determine suitability, other than common sense when one sees dents, or other evidence of age or misuse. Nevertheless, the Court of Appeals, held that the petitioner's liability was absolute as a bailor-warrantor, namely as an insurer. This we believe to be an incorrect statement. Perhaps what was intended, required petitioner to comply with the tariff regulations as an absolute duty, which the trial judge found as a fact. On the facts, certainly the Court of Appeals could not have intended to impose such a broad legal liability of an insurer on petitioner, which up to present time has only been applied to shippers of dangerous and explosive merchandise, under certain conditions.

The obligation under the law of a shipper of dangerous and explosive merchandise is that of an insurer and absolute, if without previous full written disclosure to the carrier it tenders a shipment of such merchandise which causes damage in transit. This is included in the 6th clause of the terms and provisions of the bill of lading. Certainly, this strict rule of law was never intended to apply to a shipper of a liquid general commodity prepared in a drum container which fully complied with the tariff regulations and which commodity was properly described on the bill of lading? If such was the intendment of the Court's opinion, the full impact has not been fully understood. With the decision as it now stands, a shipment of a liquid general commodity in *any* type of container is now at the peril of shipper, even though the common carrier has control of the goods and is in a beter position to explain the loss. (Italics supplied)

But even if the court intended to rule that the petitioner has the same liability of a shipper of dangerous and explosive merchandise, still it could not stand because the complaint was not so predicated. This, then is the first reported case of a shipment of a liquid general commodity which applies the same rule of liability for a shipment of dangerous and explosive merchandise.

In the very early case of *Zerega* v. *Poppe*, Federal case No. 18213, relating to transportation of a liquid, the court said:

> "It is not sufficient, in case of damage to goods received under a bill of lading which acknowledged that they were received in good order for the carrier to show that the goods were delivered to him, in insufficient packages, and that the defect was not discover-

able by him. *To relieve him from liability he must also show that the loss actually resulted from such insufficiency and from no fault* of his." (Italics supplied)

In this respect, respondent failed to offer any proof to explain the out of shape and banged up condition of the drums as depicted by the photos, introduced to show its negligence by abuse and rough handling in transit, as the proximate or contributory cause for the loss.

Respondent, with the evidence indicated, was required to go forward to prove that the damage resulted *only* from metal fatigue and not from any cause for which it may be liable proximate or contributory, such as the rough handling and abuse in transportation, failure to use skids or pallets, failure to secure, brace and block, or in the exercise of proper care that it was safe to load other merchandise on the same vehicle knowing the characteristics of methyl phenyl acetate. (Italics supplied)

Barnett v. *N. Y. C. & H. R. R. Co.*, 222 N. Y. 195;
Thompson v. *C. M. St. P. & P. R. R. Co.*, 217 N. W. 927;
Commercial Corp. v. *N. Y. Barge Corp.*, 314 U. S. 104.

4.

May a common carrier accept for transportation a shipment of a liquid general commodity in drum containers which indicate age, misuse, are out of shape and banged up upon visual examination and inspection, and in common sense issue a clean bill of lading, and upon loss contend a latent defect was the cause?

Respondent's metallurgist emphasized the fact that the photos certainly showed dents in the sides of each drum, and on further examination to questions:

> "What would be the usual and ordinary tests which would reveal a deteriorated condition of the drums as you have seen."

he replied:

> "Aside from corrosion, there is no feasible test to assess in a practical sense any damage which is stored up in a used drum."

and further:

> "As a matter of fact, isn't it also true that there is no known test that is known to the layman to determine whether a drum is suitable or not, if it is not new?

to which he replied:

> "Nothing other than his common sense if he sees gross dents, or other evidence of age or misuse."

The proof showed one drum as having been manufactured in 1943, and the other in 1947. Certainly then as part of the visual examination and inspection, and common sense

in accepting a shipment of liquids in used drums, the age, misuse and condition were fully patent. If the drums were as bad on tender as shown by the photos and as testified by respondent's metallurgist, as a matter of fact and law they were patently unfit for the shipment, and a common carrier is not obliged to accept any shipment in such condition. Respondent was then within its legal right to refuse the shipment because the bad physical condition of being banged up and out of shape, age and misuse were obvious and common sense dictated that drums so tendered were not sufficient and adequate to afford safe handling, with reasonable and proper precaution of the contents and to protect against damage to other freight. When the loss occurred, respondent could not claim a latent defect, and such was the holding in *Thompson* v. *C. M. St. P. & P. R. R.*, 217 N. W. 927, where the court said:

> "When a shipper tendered to a carrier goods for transportation, which are insufficiently crated, boxed, or loaded, and such insufficiency is discoverable by carrier upon ordinary observation and inspection, it is the duty of the carrier to refuse to receive the goods, and • • • *if the carrier does accept the goods it may not thereafter allege that the injury which they sustain in the course of transportation was due to such insufficient crating, boxing, packing or loading.*" (Italics supplied)

This is even more apparent because respondent's tariff provided this privilege:

> "The carrier will refuse to handle any article not in such condition or so prepared for shipment as to render transportation thereof reasonably safe and practicable."

Hannibal R. R. v. *Swift,* 12 Wall. 262, is authority for the following:

1. A carrier has the right to inspect proffered shipments and to refuse their acceptance when not in fit condition for transportation.

2. That if unfit for transportation, and ordinary observation would discover that fact, it is the duty of the carrier to refuse the shipment, in order that the shipper may if he can, conform the shipment to a fit condition for transportation.

3. That the acceptance of a shipment for transportation without qualification or dissent in respect of the fitness of its condition for that purpose, subjects the carrier to all the liabilities ordinarily attaching to an accepted shipment of the character to which that shipment belongs.

From this, the carrier respondent may not close its eyes, or look the other way, when shipments are so tendered. The carrier must assume its obligation by refusing to accept, or accept the same with attendant liability.

Respondent was therefore obliged to offer some proof, or explanation for its negligence in causing the bad physical condition of the drums after the completion of transportation as depicted by the photos. Not having done so, petitioner contends as a matter of law that the respondent failed to sustain its burden of proof as a common carrier on the whole case, as such bad condition was brought about by negligent rough handling and abuse; failure to secure, brace and block; failure to use skids and pallets; and loading other merchandise not suited to be mixed into a load with methyl phenyl acetate knowing its characteristics.

which separately or together was the proximate or contributory cause for the leak and the damage.

To restate petitioner's position, on either basis, the Court of Appeals erred in reversing the lower court for (1) respondent's failure to sustain the burden of proof as a common carrier in failing to explain the cause for the bad physical condition of the drums as depicted by the photos taken after the transportation was completed, (2) assuming that petitioner tendered to respondent the drums in the condition as shown by the photos, still by reason of the age, misuse, physical condition and common sense after examination and inspection, the rule in *Hannibal R. R.* v. *Swift, supra,* and *Thompson* v. *C. M. St. P. & P. R. R., supra,* applies.

Petitioner was also entitled to a finding of fact that the photos represented proof of a bad physical condition of drums upon tender of the same, either before transportation, or that such condition was caused in transportation; that there was no contrary proof that the drums were in bad physical condition after the completion of transportation; that there were no facts or circumstances showing the improbability that negligent abuse and rough handling caused the drums to become out of shape, banged up and to leak, either as the proximate or contributory cause of the loss, to entitle it to an affirmance of the judgment dismissing the complaint.

Beck v. *Sheldon*, 48 N. Y. 365, 369.

5.

As a matter of law the Court of Appeals erred by reversing a judgment which is fortified by the discretion of the trial judge who reserved decision on petitioner's motion for dismissal at end of respondent's case and again at end of trial which was supported by proof of the record for a dismissal of the complaint.

Statement of the Case

Petitioner, a New York corporation, was sued by respondent a foreign corporation engaged as a motor common carrier of property under the jurisdiction of the Interstate Commerce Commission, in the United States District Court for the Southern District of New York, on the basis of diversity of citizenship and that the amount involved was in excess of the sum of $3000.00, for negligence. Subsequently, upon motion an order was entered permitting respondent to serve an amended complaint alleging a second cause of action for breach of warranty, express and implied. All of the affirmative defenses and denials contained in the answer were deemed to apply to this second cause of action. On May 2, 1949, at Newark, N. J., petitioner tendered in good condition to respondent as a common carrier, 30 - 55 gallon drums of methyl phenyl acetate, weighing 15,622 pounds as truckload shipment of 25,000 pounds for transportation to Eli Lilly & Co. at Indianapolis, Indiana, for which a clean bill of lading was issued, after examination and inspection of the physical condition of the drums. Petitioner's employees loaded the drums onto the trailer floor and left the same lying on their sides. An employee of respondent up-ended each drum and placed

the same along the sides and front of the trailer. Petitioner was unaware that respondent intended to load any other merchandise into this vehicle. Other merchandise was later placed on the floor of the vehicle at respondent's terminal. That while respondent had skids and pallets at its terminal to raise merchandise above the same floor level of the drums to protect such property against possible leaks, or other damage, such protection or care was not taken. It was shown by proof (pages 7, 165 of appendix) that had skids been used, the general merchandise could not have been damaged by leaks because the same would have been raised 4-6 inches above the floor. That the drums were not secured, braced or blocked prior to loading other merchandise or at any other time before taking off for destination (pages 83-84, app.). That travel was over a lot of hills and speed was between 25-52 miles an hour. During transportation the driver smelled an odor, saw leakings from the trailer and made an investigation en route, and at destination two (2) drums were found to be empty. Respondent's metallurgist stated that a break in each drum was caused by fatigue, and that one drum was manufactured in 1943, and the other in 1947. That the only way to detect fatigue was by microscopic investigation at a laboratory. That there was no known test to inspect a drum for purposes of determining fatigue (401-402, app.). He did admit that jarring, jolting, vibration, shifting, bouncing, bumping, road conditions, how a drum is set in a truck and falling in transit were all contributing factors to reduce service life of a drum (407 app.). Photos taken after completion of the transportation of the external condition of drums showed each to be out of shape and banged up, while in respondent's custody as a common

carrier, for the purpose of showing negligent abuse and rough handling to which each was subjected. That such bad physical condition was not the same condition in which the drums had been tendered to respondent on May 2, 1949. That the age of the drum, gauge, condition and capacity were visible to the naked eye.

That respondent's traffic service manager admitted that methyl phenyl acetate was not a dangerous commodity, and that it was covered by the general commodities tariff which governed the movement; that there was no special or particular type of drum required for the packing, and that a used drum could be utilized for the shipment of this liquid as it complied with all regulations. In addition, he stated that a new drum was not required for this type of merchandise, although he thought a new drum should have been used.

Petitioner's proof showed its exercise of care and precaution in that each drum was actually tested and inspected for fitness and suitability before filling, after which each drum was left standing or on its side, for tests of leaks, if any, prior to being tendered for shipment.

At the end of respondent's case, a motion was made by petitioner to dismiss for failure to prove any case for negligence or for breach of any warranty. The decision was reserved and then petitioner offered proof to show the actual condition of the drums when tendered for transportation; the condition of the same drums after completion of transportation by the photos, which depicted the same to being out of shape and banged up, to establish negligent abuse and rough handling which was either the proximate or contributory cause for the leaks and damage. This proof was supported by respondent's metallurgist,

by his statement that jarring, jolting, vibration, shifting, bouncing, bumping, and road conditions besides the manner of setting a drum in the truck were contributing factors to reduce service life (407), and he also emphasized that the containers certainly showed the dents in their sides. Respondent offered no proof to show that bracing, blocking, and securing of the drums was not necessary in the face of such strong evidence of change of condition, *Tuschman* v. *Penn. R. R.*, 230 Fed. 2d 787, nor to explain the cause of the dents, or how each drum became out of shape and banged up, which was positive proof of rough handling and abuse; nor did respondent prove other than that the drums were in good condition when tendered; and two of petitioner's witnesses testified without contradiction that the condition of the drums as shown by the photos would not have been used at all.

Respondent failed to prove any reliance on the warranty and the trial judge made such a fact finding. He further found that the drums complied with tariff regulations, satisfied respondent as to its condition after examination and inspection, for which it issued a clean bill of lading, otherwise the shipment could have been rejected. He further found as a fact the tariff regulations merely require reasonable protection and the the liquid was properly described on the bill of lading. Such was the posture of the evidence.

The decision of the trial judge was based upon the ruling of *Commodity Credit Corp.* v. *Norton*, 168 Fed. 2d 161, which was identical on the facts, except that a carrier is suing in the instant case, whereas the shipper sued for damages under 49 U. S. C. A. 20 (11). Nevertheless, the rule of law is the same in both cases.

The implied warranty claimed by respondent is equivalent to the exception in the bill of lading, namely the act or default of the shipper. From a reading of the facts in the *Norton* case, *supra,* it appears that a shipment of castor seed oil in used barrels was tendered to the carrier for rail transportation from Norfolk, Va. to Edgewater, N. J. During the trip, it was found that the barrels had aked. At destination, some of the barrels were found to be empty, and an action was brought by the owner for the loss. After judgment was rendered for the defendant, an appeal was taken for failure of the court to direct a verdict for the plaintiff. The plaintiff had relied on the liability of the defendants as common carriers, and upon the presumption said to be effective that when a delivering carrier is sued, that the damage occurred on its line. The plaintiff contended as a matter of law that the defendant was liable because

1. The barrels were in actual good order and condition when received and were delivered in bad condition.
2. If the barrels were defective, the defect was patent.
3. If the defect was latent, it had become patent during the course of transportation.
4. Defendant was negligent in the handling and care of the shipment and such negligence was the proximate cause of the loss.

The judgment was reversed for error in the charge, and it is respectfully urged that the Second Circuit Court of Appeals fell into the same error as the learned trial judge in the *Norton* case, as is indicated from the following language:

"except in such a case, where as asserted here, the goods were shipped in containers which seemed to be to reasonable observation proper, but which contained defects which were not observable, latent defects, which defects caused the loss."

After discussing the matter of burden of proof and the facts, the trial judge said in the charge:

"Now, then, if you believe from the evidence that the barrels, to all seeming were in a state proper for shipment and that there were no patent or openly observable defects; and that the railroad company accepted them and placed them on the cars required for their shipment,—four cars as the Court recalls it—and if you find from the evidence that the stowage or stowing of these was proper, and if you find that there was nothing unusual in the method of transport, then you would ask yourselves whether or not the questions which I have indicated to you have been met; *whether or not there was an observable defect, and whether there was rough handling such as would put the responsibility on the carrier. If you find that there was the ordinary, acceptable handling in the shipment in the transfer of these various railroads, and if you find that there was no observable defect, then you will apply to those facts, if you so determine, the rule which I have outlined, and there would seem to the Court to be no legal responsibility on the part of the defendant company.* * * If you find, further, that, having accepted the goods which were in proper shape for shipment, that the railroad was then guilty of any mishandling or improper stowage such as would constitute negligence and that was the proximate cause of the leakage, then you properly could be said to be entitled to find responsibility on the part of the defendant." (Italics in report)

With respect to this charge, the Third Circuit Court of Appeals, said:

> "The error in the charge, we think is brought into sharp relief by the italics. The learned trial judge instructed the jury that 'rough handling', or 'ordinary acceptable handling' would make a difference in the result of the case where there was 'no observable defect' in the shipment upon receipt by the carrier. *That is not the law. As the cases already cited plainly establish the carrier is responsible without regard to the exercise of due care*, even though the damage or loss be occasioned by the independent act of third persons."

and again:

> "We conclude that the jury was told the liability of the defendant was that of an insurer, upon the specific application of the rule by the court below to the facts, the jury was erroneously let to believe that in the event it found the goods 'in proper shape for shipment' the defendant would be responsible only if it were negligent."

Petitioner has always contended that respondent merely proved its due care in the handling of the drums; that such proof was not sufficient to be relieved of its liability as a common carrier; that what was required, compelled proof by respondent to show how the loss was caused and that it was without fault on its part contributing thereto. Respondent had the burden of going forward with proof to explain the banged up and out of shape condition of the drums as shown by the photos which were taken after the transportation had been completed, which indicated its negligence in transportation.

As brought out in the *Norton* case, *supra*, on similar facts, a conflict exists between the Circuit Courts, calling for an exercise of this Court's power of supervision. The reversal of the judgment in the lower court was based on respondent being a bailee and liable only for negligence, whereas respondent was a common carrier and liable as an insurer, and therefore erroneous.

Reasons for Granting the Writ

1. The decision in this case represents the first reported determination in any jurisdiction against a shipper of a general commodity, wherein the rule of absolute liability for shipments of dangerous and explosive merchandise was applied. The only cases where courts have held absolute liability against a shipper either in England or in the United States were cases wherein there was either misbilling or misrepresentation of shipments of dangerous and explosive merchandise. Such cases are:

Bamfield v. *Goole and Sheffield Transport Co.*, 103 Law Times 201;
Great Northern Railway Co. v. *L. E. P.*, 38 Law Times Reports 711;
Pierce v. *Winsor*, 19 Fed. Case 11151;
Boston etc. v. *Shanley*, 107 Mass. 568.

The decision is important nothwithstanding (a) that at the time of tender of the shipment the drums were in better condition than at the time of delivery, (b) that the commodity methyl phenyl acetate was properly described on the bill of lading, and so found as a fact by the trial judge, (c) that the containers utilized actually complied with

carrier tariff and packing rule, and so found as a fact by the trial judge, (d) a clean bill of lading was issued after inspection and examination and so found as a fact by the trial judge.

2. The determination of this case is in conflict with the decision of *Commodity Credit Corp.* v. *Norton, supra*, in the Third Circuit Court of Appeals, and it is not thought necessary to discuss the same at further length, except that the burden of proof in such a case was properly held to be on the carrier and that the exercise of due care in the handling of a shipment was not sufficient to relieve a common carrier of its liability of an insurer.

3. The determination in this case is on a very important question of federal law which has not been but should be settled by this Court to clarify the rule in loss and damage cases under 49 U. S. C. A. 20(11), namely, does the rule of absolute liability apply to a shipper of a general commodity in the event of a loss, where there is a compliance with carriers tariff regulations in all respects, for which carrier issues a clean bill of lading. The cases cited in the opinion of the Court of Appeals, *Overbury* v. *Platten*, and *Mulvaney* v. *King Paint Mfg. Co., supra*, can be distinguished as neither relates to liability of a common carrier, but to liability of simple bailees. In one respect only, therefore, was there an absolute liability on the part of petitioner, and that was to comply with the tariff regulations, *Davis* v. *Henderson*, 226 U. S. 92. Such a compliance was definitely found as a fact by the trial judge.

4. The determination in this case reversing the judgment of the lower Court for breach of an implied warranty

which did not exist as a fact or in law, was a departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

5. The determination in this case has tremendous importance and implications in matters of commerce to shippers, carriers and suppliers of containers which are utilized in interstate shipments of merchandise, and since this is the first appellate determination in any jurisdiction interpreting packing rule of the common carrier motor industry, until a final determination is made, there will be doubt and confusion as to its meaning in future litigation. For that purpose a guide is necessary as an aid for future conduct and to limit litigation.

WHEREFORE, petitioner respectfully prays that a writ of certiorari should be granted and that this Court reverse the Court below and reinstate the original judgment of the District Court entered on September 27, 1955, in as much as the decision of the Court of Appeals is erroneous, or for any other relief as the Court may deem just and proper.

A. MASCHMEIJER, JR. INC.,
By JEROME G. GREENSPAN,
Attorney

Dated: New York, N. Y.
November, 1957.

APPENDIX TO PETITION

Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 372—October Term, 1956

(Argued June 12-13, 1957 Decided September 12, 1957)

Docket No. 24377

EASTERN MOTOR EXPRESS, INC.,

Plaintiff-Appellant-Appellee,

—v.—

A. MASCHMEIJER, JR. INC.,

Defendant-Appellee-Appellant

Before:

CLARK, *Chief Judge,*
CHASE and HINCKS, *Circuit Judges.*

From a defendant's judgment in an action tried to the Court, Southern District of New York, Conger, Judge, 141 F. Supp. 477, by a motor-carrier against a shipper for damages caused by latent defects in the shipper's containers, both parties appeal, reversed and remanded.

JEROME G. GREENSPAN, New York, N. Y. for defendant-appellee-appellant.

BERNARD AXLER, New York, N. Y. (Zelby & Burstein, New York, N. Y.) on the brief, for the plaintiff-appellant-appellee.

LOUIS SILVER, Jersey City, N. J., for the National Freight Claims Council of the American Trucking Associations, Inc., Amicus Curiae.

HINCKS, *Circuit Judge*:

On May 2, 1949, a trailer-truck belonging to Eastern Motor Express, Inc. (hereinafter called plaintiff), a common carrier, was being loaded at the plant of A. Maschmeijer, Jr., Inc., at Newark, New Jersey (hereinafter called defendant). The defendant's shipment consisted of 30 drums of methyl phenyl acetate (hereinafter abbreviated to m.p.a.). The driver's helper inspected the drums, found no leaks and gave the defendant a clean bill of lading.

The truck next stopped in Jersey City at the plaintiff's terminal where miscellaneous freight was put in the trailer. This freight was placed in the center while the drums were along the sides and front against the walls.

During the journey, the plaintiff's driver noticed moisture under the trailer and a strange odor. Upon inspection he found the floor damp, some of the miscellaneous freight soaked through, and noticed a leak in one of the drums. The driver testified he had had no accident or collisions along the way. At its final destination, on May 5, the trailer was inspected by the head of the plaintiff's claims

department. The odor was very strong and the trailer was not entered at that time, but it was observed that the underside of the trailer had lost all its paint. Later that day, the trailer was entered. Two drums were found to be leaking and nearby paint had blistered off the saddle tanks and some of the miscellaneous cargo was found to have been destroyed.

The drums had been consigned to Eli Lily & Co., and some time after they were delivered the plaintiff paid Lilly for its loss from the leakage.

In this action the plaintiff is suing for damage to its truck-trailer, the amount paid to Lilly, and for damage caused to the miscellaneous freight belonging to other shippers.

After a trial without a jury, the District Court granted motions to dismiss the complaint. The plaintiff has appealed and the defendant has cross-appealed because of the Court's failure to make certain findings.

The plaintiff alleged claims based on negligence and on breach of warranty. The breach of warranty argument is two-fold. It asserts an implied warranty of fitness and in this connection cites Rule 5, subsection 8(a), of Tariff MF-ICC No. 17, National Motor Freight Classification No. 9. The pertinent part of this rule states: "Barrels • • • drums • • • must be made of wood • • • metal • • • or other materials of such strength as to afford safe handling, reasonable and proper protection of contents and to protect against damage to other goods." This rule, the so-called "Packing Rule," was part of the contract in legal

effect—as are all properly authorized tariff rules and regulations published by carriers. *Davis* v. *Henderson*, 266 U. S. 92; *Louisville & Nashville R. Co.* v. *Chatters*, 279 U. S. 320, 331; *American Ry. Express Co.* v. *American Trust Co.*, 7 Cir., 47 F. 2d 16, Cert. den. 284 U. S. 629; *Standard Hotel Supply Co.* v. *Pennsylvania R. Co.*, 65 F. Supp. 439 (S. D. N. Y.).

The District Judge held that the above-quoted rule did "not require that a drum shall never leak * * *" but merely required that the drum afford reasonable protection. We disagree with that interpretation. Under the common law, a bailor impliedly warrants that the goods are fit for the use for which the bailment is made at least as against latent unfitness. *Hoisting Engine Sales Co., Inc.* v. *Hall*, 237 N. Y. 30, 142 N. E. 342. Thus a shipper in delivering packaged goods for shipment impliedly warrants that the containers, if not patently inadequate, are fit for the contemplated shipment. We think that the Packing Rule (Rule 5, subsection 8(a)), makes it plain that a shipper by motor carrier is within that rule. Indeed, the rule of the common law of bailment is peculiarly appropriate for application to the relationship between shippers and common carriers. For such carriers are under obligation to accept for shipment containers which are not patently unfit for such shipment. In this case, the undisputed facts imperatively required a finding that the defendant had breached an implied warranty existing under the common law as recognized by the Packing Rule. As a defense to the plaintiff's claim of breached warranty, the degree of care exercised by the defendant is irrelevant, for—with exceptions not pertinent

here—the duty of the defendant, as bailor-warrantor is absolute. *Overbury* v. *Platten*, 2 Cir., 108 F. 2d 155; *Mulvaney* v. *King Paint Mfg. Co.*, 2 Cir., 256 Fed. 612.

Since we have sustained the plaintiff's claim of breach of implied warranty, there is no need for us to consider the plaintiff's second warranty claim based on an express certification in the bill of lading or to consider its claim of negligence on the part of the defendant.

Defendant has cross-appealed from the failure of the District Court to make certain findings. It is asserted that it was error not to find the plaintiff guilty of contributory negligence due to its failure to secure or brace the barrels or at least to place the other goods on skids or pallets so that they would be 4 to 6 inches above the floor level above the drums.

The District Judge found that the defendant had failed to prove that failure to brace the drums was negligence. This finding we think well-founded. However, no express finding was made as to the plaintiff's failure to use skids and pallets. The point is not material to the issue of liability under plaintiff's claim of breach of implied warranty. If presented on remand on the issue of damages flowing from the defendant's breach the judge will doubtless give it due consideration and make any required findings. Skids and pallets apparently would not have avoided damage to other merchandise caused by the pervasive odor of m.p.a.

The defendant also asserts it was entitled to exclusive use of the trailer and thus it was not liable for damage to the other goods in the trailer. The District Judge made

several findings on this issue and indicated that, if necessary he would decide it adversely to the defendant. Such a finding is amply supported by the evidence.

The defendant also interposed deviation as defense, arguing that because the plaintiff's driver on the trip west did not follow the route prescribed by the plaintiff, plaintiff was barred from recovering in this action. It cites the old cases dealing with a carrier's absolute liability once it leaves the route contracted for. But these cases are not applicable to the situation presented by the evidence below; none go further than to hold that a carrier who has deviated from the route contracted for may not in the event of a loss avail himself of a special limitation of liability to the shipper contained in the contract of carriage. Nothing in the deviation cases suggests that a deviation by the carrier operates to relieve a shipper, who has breached his implied warranty of the adequacy of the containers from the consequences of his breach.

There is, however, no need to make a definitive ruling as to the effect of a deviation by the plaintiff on the defendant's liability because the record presented fails to show a deviation. In the operative bill of lading the space provided for statement of route was left blank and we find no evidence whatever to show that any particular route was agreed on by the parties or prescribed by the Interstate Commerce Commission. Cf. 49 U. S. C. A. 308 (a) and (b).

We hold also that the fact that the plaintiff compensated Lilly, the consignee, for its loss does not excuse the defendant for its breach even though the bill of lading expressly

excepts from the carrier's liability loss due to the shipper's default as well as the Act of God. For the plaintiff made it plain in its accompanying letter that the payment was made for the preservation of customer relations and was not to be construed as an admission of liability on the part of the plaintiff. That letter also stipulated that acceptance of the plaintiff's check should constitute an assignment to the plaintiff of Lilly's claim against the defendant. Whether, by reason of this payment the plaintiff, as Lilly's assignee or otherwise, is entitled to recover from the defendant the amount of Lilly's loss, will be a question for the court below when it comes to determine the damages.

The defendant's cross-appeal is denied. The plaintiff's appeal is granted and the case is remanded for computation of damages flowing from the defendant's breach of warranty.

Judgment

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of September, one thousand nine hundred and fifty-seven.

Present:

Hon. Charles E. Clark,

Chief Judge,

Hon. Harrie B. Chase,
Hon. Carrol C. Hincks,

Circuit Judges.

Eastern Motor Express, Inc.,

Plaintiff-Appellant,

v.

A. Maschmeijer, Jr. Inc.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed as to the appeal of A. Maschmeijer, Jr. Inc., and that said judgment be and it hereby is reversed as to the appeal of Eastern Motor Express, Inc.; and action remanded in accordance with the opinion of this court; with costs to the plaintiff-appellant.

A. DANIEL FUSARO
Clerk